STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF THE PETITION OF THE CITY OF PEKIN, a municipal corporation, FOR APPROVAL PURSUANT TO 735 ILCS 5/7-102 TO CONDEMN A CERTAIN PORTION OF THE WATERWORKS SYSTEM OF ILLINOIS AMERICAN WATER COMPANY	))))))	Docket 02-0352

MOTION OF THE CITY OF PEKIN
TO STRIKE TESTIMONY OF RICHARD REITHMILLER

The City of Pekin (the "City") hereby moves to strike all portions of the testimony submitted by Richard Reithmiller on behalf of Illinois-American Water Company ("Illinois-American"). As explained in the Direct Testimony submitted by Richard Reithmiller, the sole purpose of Mr. Reithmiller's testimony is to provide a reproduction cost new less depreciation ("RCNLD") appraisal. See Direct Testimony of Mr. Reithmiller at 3. As such, and as discussed more thoroughly below, Mr. Reithmiller's testimony is inadmissible under Illinois law, and therefore should be stricken from the record in this proceeding.

DISCUSSION:

A. The Illinois Supreme Court has specifically recognized that valuation testimony based entirely upon reproduction costs is improper and should be stricken.

Mr. Reithmiller's valuation testimony is based entirely on "the estimated cost of reproducing the water treatment, storage and distribution assets of the Pekin System with substantially identical property under current conditions." Direct Testimony of Mr.

Reithmiller at 3. The admission of this type of testimony in condemnation proceedings was specifically rejected by the Illinois Supreme Court in Department of Public Works and Buildings v. Divit, 182 N.E.2d 749, 753 (Ill. 1962).

In Divit, Louis Ray, an expert witness, admitted that his valuation testimony "was based entirely upon reproduction costs." See id. at 751. The Illinois Supreme Court observed that "the measure of damages for property taken is the amount for which the entire property would voluntarily sell, and although replacement or reproduction cost is one element which may be considered, it is not alone conclusive." Id. at 753. The Court then noted that "[t]he test is not what the improvements originally cost or would cost if replaced, but rather the value of the land and buildings considered as a whole." Id.

The Illinois Supreme Court ultimately ruled that Mr. Ray's testimony should have been stricken. "Since Ray based his opinion solely upon reproduction costs without regard to what a buyer and seller would agree upon, his testimony concerning the value of the land taken was improper." Id.

Just as Mr. Ray's testimony in Divit, Mr. Reithmiller's testimony in this proceeding is based solely upon reproduction costs. See Direct Testimony of Mr. Reithmiller at 3. As such, Mr. Reithmiller's testimony should be precluded as improper. See, e.g., Divit, 182 N.E.2d 74.

B. Illinois' eminent domain statute likewise does not allow testimony based on RCNLD in this type of proceeding.

The striking of Mr. Reithmiller's testimony for his reliance solely on RCNLD in this proceeding is further supported by Illinois' eminent domain statute, which addresses condemnation valuations as follows:

> Except as to property designated as possessing a special use, the fair cash value of a property in a proceeding in eminent domain shall be the amount of money which a purchaser, willing but not obligated to buy the property, would pay to an owner willing but not obligated to sell in a voluntary sale, which amount of money shall be determined and ascertained as of the date of filing the complaint to condemn.

735 ILCS § 5/7-121 (West 2003) (emphasis added).

While this valuation statute does not define "special use," as that term is used in the statutory exception, the Illinois Supreme Court has developed a long-standing and highly restricted special use doctrine that is applicable only in a "few exceptional cases in which market value cannot be the legal standard because the property is of such nature and applied to such special use that it cannot have a market value." City of Chicago v. Farwell, 121 N.E. 795, 797 (Ill. 1918) (citations omitted). The Illinois-American water system is not a special use property.

Illinois courts interpreting the "special use" exception contained within the eminent domain valuation statute have held that the special use doctrine only applies when "the use of property may be so ***unique*** or ***special*** that it is not ordinarily bought or sold and that therefore no 'market' exists." Department of Public Works and Buildings v. Huffeld, 215 N.E.2d 312, 316 (Ill. App. Ct. 1966) (emphasis added), citing Farwell, 121 N.E. 795. Recognizing that the special use is "a highly restricted doctrine," Illinois courts require that "the special capability must exist in the property itself and not in the value to the owner or the condemnee." People v. Young Women's Christian Association of Springfield, 375 N.E.2d 159, 162-63 (Ill. Ct. App. 1978), *rev'd on other grounds*, 74 Ill.2d 561 (Ill. 1979). Likewise, Illinois courts have recognized that the "unique" concept within the special use doctrine admits "only a few structures, principally those having

historic value, such as a Frank Lloyd Wright house, the Old Capital in Springfield, Holy Name Cathedral in Chicago or the Water Tower." Id. at 163.

"[P]roperty is classified as a special use only if it has no readily ascertainable market value, which is something quite different from its unsuitability for other uses." Department of Transportation v. Mullen, 457 N.E.2d 1362, 1367 (Ill. Ct. App. 1983). Importantly, a water system is not within the categories of properties previously recognized as special uses by Illinois courts. The special use doctrine has generally been recognized to only apply to churches, colleges, cemeteries, clubhouses, and terminals of railroads. See, e.g., Farwell, 121 N.E. at 797 (citations omitted). As recognized by the Illinois Supreme Court in People v. Young Women's Christian Association of Springfield:

> Few Illinois cases have found condemned properties to be of a special use…
>
> Our belief that the property in question is not of a special use is also confirmed by a comparison of the present case with prior decisions of this court. We do not find that the [property] is unique, as were properties labeled "special use" in other cases. [See, e.g., Sanitary District v. Pittsburgh, Ft. Wayne & Chicago Ry. Co. (1905), 216 Ill. 575, 77 N.E. 248 (railroad terminal); Chicago & Northwestern Ry. Co. v. Chicago & Evanston Ry. Co. (1884), 112 Ill. 589 (railroad terminal); Lake Shore & Michigan Southern Ry. Co. v. Chicago & Western Indiana R. R. Co. (1881), 100 Ill. 21 (railroad terminal); see also Forest Preserve District v. Hahn (1930), 341 Ill. 599, 173 N.E. 477 (picnic facility and road house not a special use); Kankakee Park District v. Heidenreich (1927), 328 Ill. 198, 159 N.E. 289 (meat-packing plant not a special use); River Park District v. Brand (1927), 327 Ill. 294, 158 N.E. 687 (picnic grove and amusement park not a special use); City of Chicago v. Farwell (1918), 286 Ill. 415, 121 N.E. 795 (soap factory not a special use)].

387 N.E.2d 305, 309-10 (Ill. 1979), *overruled on other grounds*. Certainly, a water system is not a property of the type and character that Illinois courts have held not to have a market value as that term is understood.

CONCLUSION:

For the foregoing reasons, the City's Motion to Strike should be granted and the testimony submitted by Richard Reithmiller on behalf of Illinois-American should be stricken from the record of this proceeding.

Dated: May 15, 2003

Respectfully Submitted,

CITY OF PEKIN

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By: One of it Attorneys

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CERTIFICATE OF SERVICE

Edward D. McNamara, Jr., an attorney, hereby certifies that he served copies of the foregoing Motion to Strike on the individuals shown on the attached Service List, via electronic mail, on Thursday, May 15, 2003.

//Edward D. McNamara, Jr.//
Edward D. McNamara, Jr.

VERIFICATION

I, Edward D. McNamara, Jr., certify that: (i) I am one of the attorneys for The City of Pekin; (ii) I have read the foregoing Motion to Strike; (iii) I am familiar with the facts stated therein; and (iv) the facts are true and correct to the best of my knowledge.

//Edward D. McNamara, Jr.//
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